CHEAH KHOON TEE

v.

CRIMSON DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[ORIGINATING SUMMONS NO: D5-24-384-1997 & D5-24-385-1997]
27 JANUARY 1999

CONTRACT: *Time - Time of the essence - Failure to conclude contract on time - Whether termination or rescission must be effected immediately or shortly after expiry of date of completion - Substantial delay in terminating or rescinding contract - Whether fresh limit for completion must be prescribed before contract may be terminated or rescinded - Whether delay deemed inordinate in the absence of explanation - Whether inactivity after expiry of completion date amounts to waiving right to rely on time being of the essence - Whether inactive party estopped from terminating or rescinding contract - Whether only remedy lies in suit for liquidated damages*

The plaintiff executed a sale and purchase agreement to purchase a condominium unit from the defendant. The defendant was to deliver vacant possession within 36 months from the date of the agreement and a clause therein stated that time shall be of the essence of the contract. The defendant failed to deliver vacant possession by the completion date. Some 18 months after the expiry of the completion date, the plaintiff gave the defendant notice of intention to terminate the agreement and sought a refund of monies paid as well as liquidated damages and interests. As the defendant failed to refund the monies paid, the plaintiff terminated the said agreement and filed this application pursuant to s. 56 of the Contracts Act 1950. Apart from seeking a declaration that the said agreement had been properly terminated, the plaintiff prayed for the refund of monies paid, liquidated damages, interests and costs.

The defendant contended that by terminating the agreement only some 18 months after the expiry of the completion date, the plaintiff had waived the right to rely on time being of the essence of the agreement and therefore the plaintiff was estopped from claiming to be entitled to terminate or rescind the agreement.

Held:

[1] In a situation where there has been a substantial delay in terminating or rescinding an agreement, there is a need to give a warning to the defaulting party by fixing a fresh limit for completion before a party can terminate or rescind an agreement. Such a warning should have been given by the

plaintiff in the particular circumstances of the instant case where the termination or rescission was effected some 18 months after the expiry of the completion date. There has been no explanation as to why there was such a long and substantial delay. In the premises, the delay must be considered to be inordinate.

[2] The passive conduct or the silence and inactivity on the part of the plaintiff for a period of 18 months must, in the absence of any cogent explanation, be regarded as unreasonably long suggesting either that the defendant could continue with the construction work indefinitely upon the expiry of the completion date or encouraging the defendant to think that it would be given time indefinitely until further notice is given. Such further notice relates to the giving of a fresh limit with a proviso that the failure to comply therewith would result or would be deemed to result in the contract being cancelled. No notice of any fresh limit had been given by the plaintiff to the defendant in the instant case. Further, there is evidence to suggest that the defendant had continued with construction work well after the expiry of the completion date. Therefore, the plaintiff had waived the right to rely on time being of the essence of the agreement and thus the plaintiff is estopped from terminating or rescinding the agreement. The plaintiff's remedy is to sue the defendant for liquidated damages after delivery of vacant possession.

[Application dismissed.]

Case(s) referred to:
Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308 ***(refd)***
Kang Yang Mook Xavier v. Insun Development Sdn Bhd [1995] 2 CLJ 471 ***(refd)***
Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd [1998] 4 CLJ 352 ***(foll)***
Luck v. White [1973] 26 P & CR 89 ***(foll)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178 ***(refd)***
Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 56(1)

Other source(s) referred to:
Pollock & Mulla on the Indian Contract and Specific Relief Acts, 1994, 11th edn 1994, p 578

For the plaintiff - EH Lim; M/s EH Lim, Lee & Partners
For the defendant - Satharuban Sivasubramaniam; M/s Satha & Co

Reported by S Dharmendran

JUDGMENT

Steve Shim J:

There are two applications before me, both by way of originating summons, taken out by the plaintiffs who are husband (in suit 24-384-1997) and wife (in suit 24-385-1997) respectively against the same defendant praying for similar reliefs except for the difference in the amount of refund to be paid by the defendant. The reliefs sought are in respect of a declaration that the respective sale & purchase agreements dated 29 April 1993 between the plaintiffs and defendant had been properly terminated and for the refund of monies paid by the plaintiffs as well as for liquidated damages, interests and costs.

By two separate sale & purchase agreements both 29 April 1993 entered into between the plaintiffs and the defendant, the defendant had agreed to sell two (2) units of condominium known as Parcel No. D-22-5C, storey 22 and Parcel No. D18-8B, storey 18 of Block D, situated at Ampang Hilir Kondominium, Mukim Ampang, Daerah Ulu Langat, Negeri Selangor, to the plaintiffs, subject to the terms and conditions therein. It is the plaintiffs' case that under cl. 22 (1) of the sale & purchase agreements, the defendant was to deliver vacant possession of the two units to the plaintiffs within 36 months from the date of the agreements, ie, on 28 April 1996 but the defendant had however failed to do so thereby breaching cl. 22(1) as a result of which the plaintiffs, through their solicitors, sent letters to the defendant informing of their intention to terminate the agreements and claiming for the refund of monies amounting to RM77,220 and RM33,200 paid to the defendant as well as liquidated damages and interests. The defendant had failed and/or refused to refund as demanded. The plaintiffs subsequently terminated the agreements and thereafter filed the present applications.

Now, in suit 24-384-1997, the defendant has raised the following issues namely, that the plaintiff was not entitled to terminate the sale & purchase agreement and that he was also not entitled to damages thereunder. In suit 24-385-1997, the defendant appears to have raised an additional issue *ie*, that it had prior to the termination or rescission by the plaintiff, rightfully terminated the agreement and forfeited the deposit on account of the plaintiff's failure or default in paying the progress payment. All these issues are inter-related and can be dealt with jointly.

Here, the plaintiffs have relied on cls. 7 and 22(1) of the sale & purchase agreements as well as s. 56 of the Contracts Act. Clauses 7 and 22(1) stipulate as follows:

> 7. Time shall be the essence of the contract in relation to all the provisions of this Agreement.
>
> 22(1). The said parcel shall be completed by the vendor and vacant possession, with the connection of water and electricity supply to the said parcel, shall be handed over to the Purchaser within thirty-six (36) calender months from the date of this Agreement.

As I have indicated earlier, it is the plaintiffs' contention that the defendant had contravened the provisions of cl. 22(1) above by failing to complete the works and hand over vacant possession of the two units pursuant to the sale & purchase agreements thereby giving rise to a situation in which the plaintiffs had the option of either terminating or rescinding the agreements under s. 56(1) of the Contracts Act and claim for liquidated damages or treating the said agreements as continuing until delivery of vacant possession and sue for damages. I have also said that the plaintiffs did in fact rescind the said agreements and claim for liquidated damages against the defendant. Section 56(1) stipulates thus:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

The plaintiffs have relied on a number of case authorities, namely, *Kang Yang Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471; [1995] 2 MLJ 91; *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 1 MLJ 289 and *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308. All these are High Court cases and therefore are of persuasive value only.

In defence, the defendant has raised the issue of waiver and estoppel on the following basis: (1) that if the plaintiffs had intended to treat time of the essence of the agreements, they should have terminated or rescinded the said agreements immediately upon the expiry of the completion dates prescribed therein and (2) that by effecting termination or rescission some 18 months after such expiry, there had been an inordinate delay on the part of the plaintiffs. Counsel for the defendant has submitted in effect that the plaintiffs' passive conduct tantamounted to waiving their rights to rely on time being of the essence of the agreements and therefore were estopped from claiming to be entitled to terminate or rescind the agreements in question. In this connection, he has cited the Federal Court case of *Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151 and the more recent Court of Appeal case of *Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd* [1998] 4 CLJ 352; [1998] 4 MLJ 169. In short, the defendant has alleged that the plaintiffs were guilty of laches.

Counsel for the plaintiffs has, in rebuttal, attempted to distinguish *Sim Chio Huat* and *Loke Yuen Cheng* from the instant case. He submits that in *Sim Chio Huat*, the defendant had in fact requested the plaintiff to do additional work after the completion date provided for in the contract had passed, relying, it seems, on that part of the judgment of Salleh Abas, FJ (as he then was) which reads:

> In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing.

Given the observations expressed above, it is not surprising to note that the Federal Court held the view that there was waiver on the part of the respondent in relation to the delivery dates although such waiver did not constitute a waiver of his rights to claim liquidated damages under the agreement.

As regards *Loke Yuen Cheng*, counsel contends it illustrated the point that there must be something more than mere laches before the principle of waiver or estoppel applied and that mere silence or inaction would not amount to waiver. Here, he draws attention to the peculiar factual circumstances in that case where the learned judge had apparently considered, amongst others, the elements of inaction and non-negotiation before coming to the conclusion that the appellant's conduct did not amount to a waiver that time was of the essence of the contract. I would agree with learned counsel's assessment but I think *Loke Yuen Cheng* has a much more significant impact upon the instant case. In the first instance, the Court of Appeal took cognisance of the principle enunciated in *Luck v. White* [1973] 26 P & CR 89 which states:

> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstance.

Clearly, there is a need to give warning to the defaulting party by fixing a fresh limit for completion before a party can terminate or rescind the agreement. In my view, this is more so in a situation where there has been a substantial delay in terminating or rescinding the agreement. Although such warning was not effected in *Loke Yuen Cheng*, the defendant therein could quite conceivably rely on cl. 19 of the agreement which provides:

> If the purchaser fails to deposit the balance of purchase price within the completion date or the extended date the vendors shall be at liberty to terminate this agreement by notice in writing summarily and on termination aforesaid, the purchaser's rights thereunder shall be ended and the said deposit shall be forfeited to the vendors who shall be at liberty to sell or otherwise deal with the said property in such manner as the vendors shall think fit and shall not be liable to account to the purchaser for any profit made on such sale or dealing.

No such clause exists in the instant case. Thus, it would appear that such warning should have been initiated by the plaintiffs in the particular circumstances where the termination or rescission was, in each case, effected some 18 months after the expiry of the completion date. There has been no explanation as to why there was such a long and substantial delay. In the premises, the delay must be considered to be inordinate. This is quite unlike the position in *Loke Yuen Cheng* where the delay was only a day. Indeed, it could be said that the defendants in that case had terminated the contract almost upon the expiry of the completion date. Therein, NH Chan, JCA said as follows:

> The lack of activity for such a short duration of time was not in my opinion, sufficient enough to make time cease to be of the essence of the contract; see *Buckland & Ors v. Farmer & Moody* [1978] 3 All ER 929 at p. 937.

His Lordship also cited with approval that part of the judgment of Goff, LJ in *Farmer & Moody* which reads:

> Waiver, however, is based on encouraging the purchaser to think that he will be given time indefinitely and will not be cut off without further notice. *Mere standing by is not enough, at all events unless it continues for an unreasonably long time and there is no suggestion of that in this case.*

I think the part underscored is particularly poignant in the context of this case because quite obviously the passive conduct or the silence and inactivity on the part of the plaintiffs for a period of 18 months or thereabout, must, in the absence of any cogent explanation, be regarded as unreasonably long, suggesting, quite conceivably, that the defendant could continue with the construction work on the two units indefinitely upon the expiry of the completion date or encouraging the defendant to think that it would be given time indefinitely and not be cut off without further notice. Such further notice appears to relate to giving a fresh limit with a proviso that failure to comply therewith would result or deem to result in the contract being cancelled. This is reflected in a passage cited and approved by the court of appeal in *Loke Yuen Cheng*, taken from *Pollock & Mulla on the Indian Contract and Specific Relief Acts* (11th edn. 1994), at p. 578 which reads:

> Once the condition is not fulfilled as contemplated by the terms of the agreement when time is made of the essence of the contract originally or subsequent thereto, the failure to perform the contract within the stipulated time gives a right to avoid the contract, which can be exercised while making the time the essence of the contract or subsequently thereto. *In the notice making time the essence of the contract the party can be intimated that in default of compliance with the requisition the contract will be treated as cancelled.* (emphasis mine)

In the instant case, no notice of any fresh limit had been given by the plaintiffs to the defendant. There is sufficient evidence as reflected in paras. 10, 11 & 12 of the affidavit in reply (encl. 5) and the annexed exhs. SK3, SK4 & SK5 respectively to suggest that the defendant had continued with the construction work on the two units up to October or November 1997, well after the expiry of the completion date on 28 April 1996.

In the circumstances, I am of the view that the plaintiffs have waived their rights to rely on time being of the essence of the agreements and are therefore estopped from terminating or rescinding the said agreements. This would effectively mean that the plaintiffs' remedy (as conceded by counsel for the defendant in para. 3.2 of his written submission) is to sue the defendant for liquidated damages after delivery of vacant possession of the two units of condominium, subject-matter of the sale & purchase agreements entered between the plaintiffs and the defendant.

For the reasons given, I must therefore refuse to grant the declarations sought for in prayer (1) of the applications. As the other prayers are inextricably linked to prayer (1) above, they must necessarily suffer the same fate. In the circumstances, I will dismiss the applications with cost.